

**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF GEORGIA  
SAVANNAH DIVISION**

**UNITED STATES OF AMERICA, )           CASE NO.: 4:19CR149**  
                        )  
                        )  
**vs.                      )**  
                        )  
                        )  
**BARRY WRIGHT,         )**  
                        )  
                        )  
**Defendant.             )**

**MOTION TO DISMISS COUNT  
TWO OF THE INDICTMENT**

NOW COMES BARRY WRIGHT, Defendant herein, by and through his undersigned counsel and moves this court pursuant to Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure, for an order dismissing Count Two of the indictment.

**GROUNDS**

Count Two of the indictment fails to state an offense and does not allege facts sufficient to support a charge based on the stated statutory violation.

**MEMORANDUM OF LAW**

Under Rule 12, a defendant may raise defects in an indictment through a pre-trial motion, including for “failure to state an offense.” F.R.Cr.P. 12(b)(3)(B)(v). “To pass constitutional muster, an indictment must allege every

element of the crime charged and in such a way as to enable the accused to prepare his defense and to allow the accused to invoke the double jeopardy clause in any subsequent proceeding.” *United States v. Rainey*, 757 F.3d 234, 247 (5th Cir. 2014) (alterations and internal quotation marks omitted). The indictment must provide “a plain, concise, and definite written statement of the essential facts constituting the offense charged.” *United States v. Wittich*, 54 F. Supp. 3d 613, 621 (E.D. La. 2014) (quoting F.R.Cr.P. 7(c)(1)).

A district court is “required to dismiss [any count of an] indictment [that] fails to allege facts that constitute a prosecutable offense.” *United States v. Cure*, 804 F.2d 625, 627 (11th Cir. 1986) (per curiam) (emphasis added). A motion to dismiss is appropriate for testing whether the facts, as alleged, would constitute a crime. See, e.g., *United States v. Kaluza*, 780 F.3d 647, 664 (5th Cir. 2015) (affirming the dismissal of certain counts of the indictment because the “Defendants do not fall within the meaning of the statute”).

Respectfully submitted this 26<sup>th</sup> day of May, 2020.

s/Alex L. Zipperer  
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**CERTIFICATE OF SERVICE**

This is to certify that I have on this day served all the parties in this case in accordance with the notice of electronic filing (“NEF”) which was generated as a result of electronic filing in this Court.

Respectfully submitted this 26<sup>th</sup> day of May, 2020.

s/Alex L. Zipperer  
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